United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

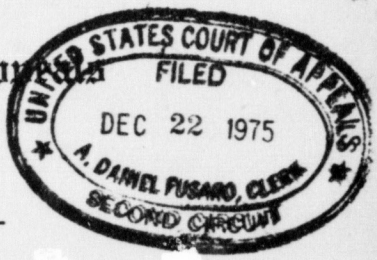
75-7426

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7426



IRVING STOLBERG,

Plaintiff-Appellant,

—v.—

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT,

Defendants-Appellees and Respondents-Appellees.

B P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF PLAINTIFF-APPELLANT

LOUIS M. WINER
Attorney for Plaintiff-Appellant

MESSRS. TYLER, COOPER, GRANT,
BOWERMAN & KEEFE
P. O. Box 1936
205 Church Street
New Haven, Connecticut 06509
(203) 789-0700

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BRIEF OF PLAINTIFF-APPELLANT

Preliminary Statement

This is an appeal from a decision and ruling of Honorable M. Joseph Blumenfeld, United States District Judge, which is not reported, denying all relief sought by plaintiff by way of contempt proceedings to enforce an earlier judgment.

Statement of Issues

In civil contempt proceedings brought on to enforce compliance with, and to prevent nullification of and interference with, an earlier judgment ordering that plaintiff be reinstated with tenure to a State College faculty position at a State College governed by defendant trustees, under circumstances in which after reinstatement pursuant to the judgment defendant trustees, their attorneys, and/or persons in privity with them, acted or permitted actions to bring about the termination of plaintiff's salary on the grounds of an issue which could have been raised before trial and judgment but was not:

1. Did the District Court err in failing to hold that defendant trustees, their attorneys, and persons in privity with them, were precluded from raising issues which could have been raised for adjudication before trial and judgment, but which were not so raised, so as to frustrate or nullify the purpose of the judgment ordering reinstatement?

2. Did the District Court err in not reaching the merits of plaintiff's claims?

3. Did the District Court err in denying plaintiff's contempt motion and all relief sought in connection with that motion?

4. Did the District Court err in interpreting or clarifying the judgment so as to allow defendant trustees, their attorneys and persons in privity with them, after having reinstated plaintiff with tenure pursuant to the judgment,

to suspend plaintiff's salary on grounds of an issue which could have been raised for adjudication before trial and judgment but was not?

5. Did the District Court err in not reaching the merits of plaintiff's claims that the actions of certain respondents were in bad faith, which claims supported the relief sought by plaintiff and plaintiff's claims for attorneys' fees?

6. Did the District Court err in denying plaintiff's motion for immediate and interim salary relief pending the disposition of other issues, after defendant trustees and other respondents had conceded that the State Comptroller's duty to pay State College faculty salaries upon payrolls submitted was a ministerial duty?

STATEMENT OF THE CASE

I.

Nature of the case, course of proceedings, and disposition below.

Plaintiff Irving Stolberg brought this action under the Civil Rights Act, 42 U.S.C. §1983, in December of 1969. It was brought against the former President of Southern Connecticut State College ("SCSC") and the members of the Board of Trustees for the State Colleges of the State of Connecticut. Stolberg claimed that the nonrenewal of his teaching contract, his dismissal in 1969, and the consequent denial of tenure to him at SCSC, was in violation of his First Amendment and Due Process rights. The action was tried to the court in December of 1971 and the District Court, Hon. M. Joseph Blumenfeld, Chief Judge, found

defendants' actions to have been in retaliation for plaintiff's exercise of protected First Amendment rights, ordered plaintiff reinstated with tenure and no loss of seniority, and awarded $9,000.00 in compensatory damages to cover his salary loss.

The District Court's unreported decision was dated February 29, 1972, and judgment thereon was entered March 7, 1972. Defendants did not appeal. Stolberg appealed to this Court, seeking additional compensatory damages, exemplary damages, and attorneys' fees. This Court affirmed in part, reversed in part, and remanded for determination of reasonable attorneys' fees. *Stolberg* v. *Members of the Board of Trustees for the State Colleges of the State of Connecticut,* 474 F.2d 485 (2d Cir. 1973).

In 1970 and 1971, after Stolberg's dismissal and the commencement of this action, and before the pretrial conference in this action was held, Stolberg campaigned for, was elected to, and took a seat in Connecticut's General Assembly. At the pretrial conference, counsel for defendants pointed this out and claimed that Stolberg could not obtain the equitable relief he sought in this action by way of reinstatement because certain Connecticut "dual job ban" provisions would forbid his appointment to or holding of a State College faculty position while a member of the General Assembly. Stolberg's position was and has been that such provisions do not apply to the State College faculties because those institutions are not part of the executive, judicial, or legislative departments of the State government, to which the "dual job ban" provisions apply, but are rather independent and autonomous institutions in the State's separately established System of Higher Education. In any event, provision was made in the Pretrial Report

ordered by the District Court that defendants were to amend their pleadings to raise this defense. Defendants never did so. At trial, defendants put on no defense at all, offered Stolberg reinstatement with tenure in open court, and never referred to the "dual job ban" issue in their Post-Trial Brief or otherwise. As noted above, the judgment that followed ordered reinstatement with tenure.

After negotiations between counsel for plaintiff and defendants, plaintiff was reinstated at SCSC by the trustees in June 1974, effective August 28, 1974, pursuant to the judgment, and began serving as a faculty member there. Two months later, the same Assistant Attorney General who had represented defendants upon trial, and who had announced in open court that plaintiff would be reinstated with tenure, on behalf of the same Attorney General who had been in office at all pertinent times from 1971 through 1974, advised the State's Comptroller, without referring to what had taken place before or at trial in connection with the claim as to the claimed "dual job ban" defense, that because of the "dual job ban" provisions Stolberg was ineligible to serve on the faculty at SCSC. As a consequence, since late November of 1974, although the trustees continued and continue to keep Stolberg on the payroll and to maintain his faculty appointment, Stolberg's salary has been suspended and withheld by the Comptroller. In order to maintain his position, Stolberg has continued to teach, but he has received no salary for more than a year. It has been the Attorney General's position, acting simultaneously on behalf of the trustees as well as for other state officials involved, that the trustees are bound by the 1972 judgment but the Comptroller is not.

Other avenues of resolution failing, contempt proceedings were brought on by plaintiff by order to show cause entered

December 16, 1974. (J.A. 5a, 40a, 86a; R. Docs. No. 25, 26.) The proceedings were brought against the original defendants and against other state officials, as respondents, who by their actions were frustrating, effectively nullifying, and rendering futile or burdensome, the results of the 1972 judgment: they interfered with the normal and regular salary payments that would have been made to plaintiff, on the order of the trustees pursuant to their due appointment and reinstatement of plaintiff with tenure in accordance with the earlier judgment, but for the conflicting advice of the Attorney General's Office and the action of such state officials upon that advice. The procedures as to the non-party respondents followed those used, for example in *Backo* v. *Carpenters Local 281,* 483 F.2d 176, 180-82 (2d Cir. 1970), cert. denied, 404 U.S. 858, 30 L. Ed.2d 99, 92 S. Ct. 110.

In the course of the subsequen. proceedings, the Attorney General, appearing for all defendants and respondents, admitted that the duty of the Comptroller generally to make such salary payments to State College faculty members as were authorized by the trustees was a ministerial duty. Stolberg thereupon sought an interim order requiring that salary payments be made on the grounds that this admission established that the Comptroller's duty was ministerial in these matters and placed him in such relation to the trustees under Rule 65(d), F.R. Civ. P., that he also was bound by the earlier judgment.

On June 23, 1975, the District Court entered its Memorandum of Decision denying all relief sought by order to show cause. Judgment was entered June 25, 1975, and on June 27, 1975, the District Court also denied the interim relief sought. The statement of facts relevant to the issues follows.

II.

Statement of facts.

A. *Events and proceedings from commencement of action to judgment in March of 1972.*

The complaint filed in December 1969 sought both equitable and legal relief by way of reinstatement with tenure, compensatory and exemplary damages, and attorneys' fees. (J.A. 8a-9a.) Defendants' Answer and Defenses, filed January 9, 1970, closed the pleadings, and these constituted the pleadings upon which the action was tried in 1971. (J.A. 10a-11a.)

A pretrial conference held before special masters took place April 22, 1971. Defendants' Pretrial Memorandum, filed in connection with that conference, stated:

* * * * *

> "The defendants further direct the Court's attention to the fact that in 1970 the plaintiff was a successful candidate for State Representative. On January 6, 1971 he was sworn in as a member of the Connecticut General Assembly in that capacity."

* * * * *

> "When the plaintiff became a member of the General Assembly of the State of Connecticut, he became ineligible for the orders he seeks. The Connecticut Constitution Article III, Section 11 provides:
>
> > 'No member of the general assembly shall[,] during the term for which he is elected, hold or accept any appointive position [or office] in the judicial

or executive department of the state government . . .'

"Section 2-5 of the Connecticut General Statutes provides:

'No member of the general assembly shall, during the term for which he is elected, be nominated, appointed or elected by the governor, the general assembly or any other appointing authority of this state to any position in the judicial, legislative or executive department of the state government . . .'"

* * * * *

" . . . Therefore, even if this Court should decide the factual and substantive legal issues in favor of the plaintiff, it cannot grant the mandatory injunctive relief sought because the plaintiff has voluntarily cut himself off from his prior period of employment." (J.A. 12a-15a, R. Doc. No. 17.)

The Pretrial Report, dated April 22, 1971, and "So Ordered" by Honorable Robert C. Zampano, United States District Judge, May 7, 1971, referred to the fact that plaintiff sought reinstatement and damages, that he was then a member of the state legislature, and that defendants were to file an amendment to their answer adding a special defense within seven days. No such additional defense was ever filed. (J.A. 16a-18a, 43a, 90a, 91a, 120a.)

Defendants' Post-Trial Brief, filed February 16, 1972, made no reference to any claim that Stolberg's position in the General Assembly constituted a basis for the defense against the equitable relief of reinstatement with tenure sought by Stolberg. (J.A. 19a, R. Doc. No. 20.)

The trial court was clearly aware that Stolberg sought both "equitable and legal relief", and it so stated at page 8 of the Memorandum of Decision. (J.A. 33a, R. Doc. No. 21, p. 8.) The trial court was also aware of plaintiff's position in the General Assembly. It stated at page 10 of its Memorandum of Decision, in denying certain elements of consequential damages:

> ". . . [H]is [plaintiff's] ability to secure another position teaching geography almost immediately and his subsequent election to the Connecticut House of Representatives from the district encompassing SCSC suggests that there was no injury to either his professional or general reputation. . . ." (J.A. 35a.)

At the close of the trial, defendants' attorney stated in open court that defendants and the Board of Trustees would grant tenure to plaintiff:

* * * * *

> "Mr. Giber: It [the Board] is willing to grant tenure. He has never been denied tenure, might be one way to state it.

* * * * *

> "The Court: All right. But I mean the point is we are now talking about any damages he may have sustained.
>
> As far as relief goes, in order to grant tenure, it has to be considered in the light of the fact that there is a statement in open Court that tenure will be granted at any time. . . ." (J.A. 57a, R. Doc. No. 8, Tr. Proceedings Dec. 21, 1971, p. 169.)

This Court referred to such statement by defendants in its opinion in the earlier appeal in affirming the denial of punitive damages:

> "... At the end of the trial in December, 1971, counsel for the trustees stated in open court that the trustees were at that point willing to offer appellant tenure. Largely from this statement, Judge Blumenfeld concluded that an award of exemplary damages against these State officials was unnecessary to secure 'full compliance with constitutional requirements' and might, to the public's detriment, unnecessarily deter responsible citizens from agreeing to serve in the voluntary capacity of members of the Board. ..." 474 F.2d 485 at 489.

As indicated in this Court's earlier opinion, the trial court:

> "... found the defendants' action to have been in retaliation for Stolberg's exercise of his First Amendment rights and awarded him reinstatement with tenure and no loss of seniority and $9,000 to cover his salary loss. ..." 474 F.2d 485 at 486.

Throughout these proceedings, that is, at the pretrial conference, at trial, and on appeal, defendants were represented by Assistant Attorney General Sidney D. Giber on behalf of Attorney General Robert K. Killian. (J.A. 15a, 57a-60a, 26a; 474 F.2d at 486.)

B. *Proceedings after judgment, first appeal, and plaintiff's reinstatement.*

Judgment was entered March 7, 1972. On March 17, Stolberg moved under Rules 52 and 59 for amended and

additional findings, for alteration or amendment of judgment, or for a new trial on the issue of damages, and the motion was denied April 27. Plaintiff filed his appeal May 25, 1972. (J.A. 3a-5a.) No motion for a stay was filed by defendants, nor did they file any appeal.

Plaintiff's appeal was argued December 6, 1972, and decided January 29, 1973, as indicated above. 474 F.2d 485.

Exhibit 1 introduced at the hearing January 7, 1975, in the contempt proceedings was a stipulation of that date, and paragraphs 13 through 27 of the stipulation described the events between April of 1972 and 1974 leading to plaintiff's reinstatement. (J.A. 104a-109a, R. Doc. No. 1, ¶¶13-27.) On April 6, 1972, Stolberg wrote to the Chairman of the Board of Trustees to express his concern over not having received any communication as a result of the District Court's decision. The Board of Trustees took no action until June 9, 1972, when it adopted a resolution authorizing the President of SCSC to offer reinstatement to plaintiff. By that time, normal academic practices had required a commitment from Stolberg at the institution where he taught following his dismissal from SCSC. In any event, attorneys for plaintiff and defendants negotiated about the time of plaintiff's return, the rank at which he was to return, the amount to be awarded as attorneys' fees pursuant to the decision of this court, and other matters. (J.A. 104a-105a.) As part of these negotiations, by letter dated July 10, 1973, the Attorney General, by Assistant Attorney General Giber, wrote to plaintiff:

> "As to your second question: What action will the Attorney General or the defendants take if Professor Stolberg maintains his seat in the legislature and ac-

cepts reinstatement at Southern Connecticut State College? The defendants have been ordered to reinstate the plaintiff with the same seniority as if the contract had been renewed in 1969. You have received Doctor Jennings' letter which states the pay grades for assistant professor. We realize that your client has had commitments to Quinnipiac College and we are willing to make every reasonable concession required to offer the courses for which it relies upon the services of Professor Stolberg. The defendants seek to comply not only with the letter of Judge Blumenfeld's order, but with the spirit of his order, as well. The defendants are holding open the doors to SCSC whether Professor Stolberg decides to return for the 1973-1974 school year or the 1974-1975 school year.

"You stated in your letter that your client has questions concerning the state constitution and in reply to your request for copies of any earlier opinions on the question of whether Article 3, Section 11, of the state constitution covers faculty members of a state college, I am enclosing a copy of an opinion dated February 9, 1971. I am sure that you did not intend to ask that the Office of the Attorney General make any commitments, other than on behalf of the defendants. I am confident that you will render your client your usual sound legal advice on any questions he has raised." (J.A. 105a-106a.)

By letter dated February 6, 1974, plaintiff notified defendants' counsel that he would return to SCSC at the beginning of the 1974-1975 academic year. Respondent Giber replied February 19, 1974, that he was "personally pleased

at" Stolberg's decision to return. (J.A. 106a, ¶20.) The parties were unable to agree to the amount of attorneys' fees, and in March of 1974 a hearing was held and an award made, and judgment entered for those fees. (J.A. 107a, ¶18.) On June 7, 1974, the Board of Trustees recorded Stolberg's return and reinstatement at SCSC, the effective date being August 28, 1974, and reinstated Stolberg pursuant to the Court's judgment. (J.A. 106a-107a, ¶21.) The appropriate "Payroll Notice" was signed and submitted by SCSC's Vice President for Administrative Affairs, effective August 28, 1974, and all payrolls submitted for SCSC for the payroll period including August 28, 1974, and for subsequent periods, have carried Stolberg's name. (J.A. 107a-108a, ¶¶23-24.) Stolberg was reinstated by the trustees pursuant to the 1972 judgment. (J.A. 107a, ¶22.)

Up to and including a check dated November 8, 1974, payroll checks were issued upon such payrolls and delivered to Stolberg. For subsequent payrolls, although checks drawn to Stolberg's order were prepared and payroll warrants for dates on and after November 22, 1974, were duly issued and registered, the State's Comptroller and his staff, acting on the basis of and as a result of an opinion written and furnished by respondents Giber and Killian, dated October 28, 1974, began withholding payroll checks. Stolberg continued and continues to serve as an appointed member of the faculty at SCSC, and no form has been submitted by any authorized payroll officer at SCSC to terminate Stolberg's payroll status as would be required by applicable regulations. (J.A. 107a-109a, ¶¶24-27.)

C. *Suspension of salary payments.*

This situation goes back to October of 1974. The Auditors of Public Accounts for the State of Connecticut raised

questions whether Stolberg, during the term for which he was elected to the General Assembly, could hold "any appointive position in the Executive Branch of the State Government. . . . " (J.A. 61a-62a.) This question was transmitted by Governor Meskill, as he then was, to the Board of Trustees, who responded by letter dated October 17, 1974:

> "Reference is made to your letter of October 8 concerning Mr. Irving Stolberg. As noted by the State Auditors in their letter of October 7, the Trustees were required by the United States District Court to return Mr. Stolberg to the faculty of the Southern Connecticut State College. At the time the Court made its ruling, Mr. Stolberg was a member of the General Assembly. In view of these facts the Trustees believe it would be inappropriate for them to raise any questions with Mr. Stolberg concerning his position on the faculty." (J.A. 63a-64a.)

There was further correspondence among State officials, and an Attorney General's opinion letter to the Comptroller, which resulted in the suspension and withholding of Stolberg's salary, dated October 28, 1974, was sent in reply to the Comptroller's inquiry seeking advice on this matter, dated October 15, 1974. That opinion letter is set forth in full in the Joint Appendix. (J.A. 65a-72a.) The letter made no reference to the fact that the question of the effect of the "dual job ban" as a defense was raised at the pretrial conference, to the fact that it was to have been added as a defense, to the fact that defendants had failed to add the defense, or to the fact that defendants had offered reinstatement with tenure in open court in 1971 with the knowl-

edge that plaintiff was then serving in the General Assembly. Based on an earlier opinion letter, dated February 9, 1971, the Attorney General concluded that the "dual job ban" did extend to faculty positions at Connecticut's State Colleges and went on to state that ". . . the sole question remaining to be determined is whether [Stolberg] is now a member of the General Assembly or an Assistant Professor employed by Southern Connecticut State College." (J.A. 71a.)

The letter then discussed a doctrine most recently considered in *State ex rel. Butera* v. *Lombardi,* 146 Conn. 299, 303, 150 A.2d 309, 310-11 (1959), in which Connecticut's Supreme Court indicated Connecticut's general adherence to the "doctrine of implied relinquishment of office" under which an individual who holds one office and then accepts a second is deemed to have made an implied surrender of the first office where, by constitutional and statutory provision, the holding of both offices is forbidden. (J.A. 71a-72a.)

Thus, it would appear that if the doctrine of implied relinquishment of office applied, and if Connecticut law barred an individual from holding a seat in the General Assembly and a State College faculty position at the same time, the individual, upon assuming the second, would have relinquished the first by implication. Plaintiff having been dismissed from SCSC in 1969, having been elected to and assumed his seat in the General Assembly in 1970 and 1971, and having returned to SCSC in 1974 after an absence of five years, the natural application of that doctrine, if it were applicable, would appear to lead to his implied relinquishment of his seat in the General Assembly. Neverthe-

less, respondent Giber made the following conclusion at the close of his opinion letter:

> "Applying the principle set forth in *State ex rel. Butera* v. *Lombardi, supra,* we conclude that the effect of the decision of the United States District Court was to restore Irving Stolberg to his position and rank of Assistant Professor as of 1969 and that in January, 1971, when Stolberg became a member of the General Assembly he surrendered his position at Southern Connecticut State College and that during the term for which he is elected Irving Stolberg cannot hold the position of Assistant Professor at Southern Connecticut State College." (J.A. 72a.)

At the hearing on the contempt motion, January 7, 1975, respondent Giber was asked when it had occurred to him that the effect of the court's decision was to restore plaintiff to his position as of 1969. He testified:

> ". . . I had questions in my mind as to whether Mr. Stolberg had knocked himself out of the legislature or whether he had knocked himself out of a job."
>
> "And ultimately after I read the case I would presume that about the time I finally wrote this opinion [October 28, 1974] I finally worked out exactly what I wanted." (J.A. 118a, R. Doc. No. 9, Tr. Proceedings Jan. 9, 1975, pp. 27-28.)

He testified that he understood that the Trustees had reinstated plaintiff pursuant to the 1972 judgment and had done so on his advice. He further testified that he advised the members of the Attorney General's Office that the Attorney General had requested leave of the court to amend

the pleadings to add the "dual job ban" as a defense before the time of trial, had been granted permission to do so, had not so amended defendants' pleading, and that the Attorney General was aware of it before the letter of October 28. (J.A. 118a-120a.)

Plaintiff called these matters to the attention of the Attorney General by letter dated November 12, 1974. Claims set forth in that letter were that attempts to vitiate, resist, or interfere with, the District Court's judgment, even if the claim as to the applicability of the "dual job ban" were correct, could be made only at the peril of being found in contempt; that the Comptroller was under a ministerial duty to continue such salary payments as were authorized by the State College trustees; and that there was a clear conflict between the positions taken by the Board of Trustees, on the one hand, and the Attorney General and other executive officers, on the other hand. If the State Colleges were not part of the Executive Department, then the "dual job ban" would not apply; if they were part of the Executive Department, then the conflicting views within that Department should have been resolved by the Governor. In these circumstances plaintiff requested that the Governor, the State Comptroller, and the Board of Trustees, be advised of those views, and suggested that it would be appropriate for the state to seek to resolve such disparate views by means of an action for declaratory judgment. (J.A. 75a-82a.)

On November 18, 1974, the Attorney General replied in part:

> "You requested that we advise the Governor, the State Comptroller and the Board of Trustees for the

State Colleges of your views. As the general supervision of the legal matters of the state is vested in the Attorney General and as we have found no reason to alter the tenor of our advice to our clients, we do not deem it appropriate to forward your opinion, nor do we deem it appropriate for you to directly contact our clients." (J.A. 83a-84a.)

D. *Plaintiff's application and petition filed December 16, 1974.*

The contempt proceedings upon which this appeal follows were brought on by order to show cause issued December 16, 1974, upon plaintiff's Verified Application and Petition for Issuance of Order to Show Cause and for Contempt Judgment. (J.A. 40a, 86a.) The Application and Petition sought a hearing before the court why an order should not be made against "defendants, attorneys for defendants herein, other respondents, and their agents, employees, and all other persons in active concert and participation . . ." with them, to restrain the continuance of acts and omissions calculated to impair, defeat, impede, or prejudice plaintiff's rights under the 1972 judgment and calculated to harass plaintiff in connection with his reinstatement to SCSC pursuant to the 1972 judgment, and seeking further appropriate injunctive and contempt orders and damages and attorneys' fees.

The allegations of the Verified Application and Petition were set forth in twenty-five paragraphs. On January 31, 1975, an amendment was filed upon consent correcting errors in paragraphs 3 and 24 of the Application and Petition and adding paragraph 26 alleging that the Comptroller and two members of his staff named as respondents were

agents for defendant trustees, and that all of the respondents in their actions or omissions in effecting the withholding of plaintiff's salary had actual notice of the judgment and were in active concert or participation with defendants, their agents, or attorneys. All defendants and respondents appeared by a single member of the staff of the Attorney General. (J.A. 89a.) In their answer to the Application and Petition, defendants and respondents admitted all paragraphs except paragraphs 3, 6, 9, 22, 23, 24, and 26. (J.A. 90a.)

A review of the allegations of the Application and Petition, as amended, and the responses, shows that the facts related above were substantially admitted. (J.A. 40a-55a, 90a-92a.) In addition, paragraph 2, which was admitted, established that plaintiff had begun his service as a member of the House of Representatives in 1971 and had served continuously there after that. Paragraphs 7, 18, and 19, which were admitted, established the statutory provisions in Connecticut which specify the pertinent powers, duties, and responsibilities, of the State's Auditors, of the trustees of the State Colleges, and of the Comptroller as to payment of salaries. Paragraph 25, which was admitted, established that Attorney General Killian and Assistant Attorney General Giber were at all pertinent times attorneys for defendants. Paragraph 13, which was admitted, established correspondence between Stolberg and Governor Meskill in October and November of 1974 about the developing impasse, in which Stolberg requested a hearing before anything was done on the matter, and in response to which Governor Meskill advised Stolberg that the Governor regarded the Attorney General's opinion

letter as dispositive and that consequently no hearing would be afforded.

Thus, the pertinent pleadings established that by the end of November of 1974, all defendants and respondents knew of the controversy, had actual notice of the District Court's judgment or ruling under which Stolberg had been reinstated, and knew of the trustees' position that under those circumstances they would not raise questions about his service on a State College faculty. The situation by that time was: that defendant trustees continued to maintain Stolberg's faculty appointment and to cause his name to be submitted on regular bi-weekly payrolls, but did no more than that; that Stolberg continued and continues to teach in order to maintain his position and tenured status; and that the respondents, on the basis of the Attorney General's opinion letter of October 28, 1974, brought about and permitted the suspension and withholding of plaintiff's salary. The crux of plaintiff's Application and Petition, which allegations were denied by defendant and respondents, alleged the following:

> "23. Defendants and respondents have acted to disobey, resist, and/or interfere with or prevent compliance with, the order contained in the Judgment of this Court in this action.
>
> "24. The acts and omissions of defendants and respondents alleged hereinabove are and have been calculated to impair, defeat, impede, and prejudice, and have so impaired, defeated, impeded, and prejudiced, the rights of the plaintiff, in that although this Court ordered in its judgment that plaintiff be reinstated at Southern Connecticut State College, and in that although defendants sought and were given the oppor-

tunity to determine the rights of plaintiff to be reinstated in the light of the constitutional and statutory provisions of the State of Connecticut referred to above, defendants did not take further steps to have those questions adjudicated herein, but defendants and respondents have caused or permitted plaintiff to be reinstated at Southern Connecticut State College and shortly thereafter have caused or permitted the suspension, termination, and withholding, of plaintiff's salary payments on grounds which they sought to and were permitted to raise in this action before trial and judgment, and then failed to raise, allowing judgment ordering such reinstatement with tenure."

* * * * *

"26. Respondents Agostinelli, Wayne, and Brooks, were at all pertinent times agents for defendants herein, and respondents Meskill, Agostinelli, Killian, Giber, Becker, Donohue, Wayne, and Brooks, in their actions and omissions in effecting the withholding of salary payments to plaintiff as alleged herein or in causing or permitting the withholding of such payments, were and are in active concert or participation with defendants, their agents, and/or attorneys, and have actual notice of the Judgment of this Court, a copy of which is annexed hereto as Exhibit D." (J.A. 53a-59a, 91a-92a.)

E. ***Initial position of defendants and respondents.***

Defendant trustees had taken the position in October and November of 1974 that they would not question Stolberg's faculty position because he was a member of the General Assembly in 1971 and 1972 at the time of the 1972 judg-

ment. They advised Governor Meskill of this by letter dated October 17, 1974, and the trustees' minutes for November 1, 1974, show that the trustees noted that, "At the time the Federal Court had ordered the Board to reinstate Mr. Stolberg as a faculty member at Southern Connecticut State College it was known by the Attorney General, who represented the Trustees, that Mr. Stolberg was also serving as a legislator." (Rec. Doc. No. 28, Appendix 9.)

This position as to defendant trustees was confirmed in the Brief of Defendants and Respondents in Opposition to Petition for Contempt Judgment, filed in the proceedings below, in which it was stated on behalf of defendant trustees:

> "Finally, the defendants have not been wanting in diligence. They have reinstated the petitioner, placed his name on every payroll and resisted all suggestions that he be removed from his teaching position and that his name be removed from the S.C.S.C. payroll. . . ." (J.A. 97a-98a.)

At pages 3 and 4 of the same brief, the respondents' position was stated:

> "Meanwhile, on the basis of the Attorney General's advice, the respondent State Comptroller commenced withholding the petitioner's bi-weekly S.C.S.C. pay checks for the pay period commencing on November 6, 1974 and to date has continued to withhold same. . . . In the interim the Board of Trustees through its personnel at S.C.S.C. has continued to date to submit to the Comptroller the petitioner's name on each succeeding college payroll for payment. . . . " (J.A. 97a-98a.)

In addition, defendants and respondents once again made a tentative invitation to the District Court to decide the issue of the applicability of the "dual job ban" in accordance with the two letters of advice of the Attorney General dated February 9, 1971, and October 28, 1974. (J.A. 99a.)

F. ***Factual aspects of pertinent state law.***

The federal question at issue here had and has nothing to do with the constitutional rights originally asserted by plaintiff in this action; it has to do with the integrity of the federal judgment entered upon those claims in affording relief for the violation of such rights, the finality of that judgment, and the degree to which actions under and in reliance on that judgment are proof against attempts and actions, by persons bound by the judgment, to frustrate or nullify the remedies afforded Stolberg pursuant to the judgment by raising issues that could and should have been raised prior to the judgment if they were to have been raised at all by such persons. The issue whether Stolberg could hold or be returned to a faculty position at SCSC while a member of the General Assembly clearly could have been raised for adjudication and was to have been raised for adjudication in this action before judgment. The federal question here is whether Stolberg is entitled to be free from attempts to defeat or undermine his reinstatement with tenure by those bound by the judgment who subsequently raise issues that could or should have been adjudicated in connection with the judgment ordering reinstatement with tenure.

In these proceedings, however, it became pertinent not only what the definitive answers might be to questions of

state law but also whether positions asserted by respondents were reached and asserted in good faith.

The three principal issues of state law involved, on none of which is there a definitive statement by the Supreme Court of Connecticut, are: (1) does the "dual job ban" apply to the faculties of the State Colleges? (2) if the "dual job ban" does apply to those faculties, how would Connecticut courts apply the "doctrine of implied relinquishment of office" to Stolberg in the instant circumstances? and (3) under Connecticut law, once plaintiff has been "duly appointed" to his position on the faculty of a State College, does the State Comptroller have any discretion to withhold salary payments provided for on subsequent payrolls duly submitted for payment under the auspices of defendant trustees?

On each of these issues, defendants and respondents in their brief in opposition urged a determination of the state question in accordance with the Attorney General's recent opinions. As to each such issue, it became a question in these proceedings not what the definitive determination of that issue was but whether it had been raised and asserted in good faith by respondents.

G. *Defendants and respondents' concession as to the ministerial duty of the State Comptroller.*

In the Reply Brief of Defendants and Respondents, they conceded that:

> ". . . Certainly if the plaintiff were not a member of the General Assembly and had rendered the teaching service to his college the Comptroller would have no choice but to pay him, i.e. he would be under a minis-

terial duty to pay under Sec. 3-119. . . ." (J.A. 110a; R. Doc. No. 32, p. 12.)

Upon this concession, it appeared plain that the general relationship between the Comptroller and the Board of Trustees in connection with the regular payment of faculty salaries at the State Colleges was such that a judgment binding on the Board of Trustees would also be binding on the Comptroller under Rule 65(d), F.R.Civ.P.

H. *Plaintiff's motion for interim order re salary payments.*

Upon the concession that the Comptroller's duty to make salary payments was a ministerial duty, plaintiff sought an interim order requiring that salary payments be made and that fringe benefits be continued in effect ". . . until such time as proceedings upon the Order to Show Cause herein are determined by this Court and until such further time as this Court specifies to permit plaintiff reasonably and equitably to comply with such orders as are entered by this Court in said proceedings." (J.A. 111a-112a.) Plaintiff's position was that, under familiar principles: (1) defendants (as they conceded), and the Attorney General together with members of his staff who had represented defendants, were precluded by the judgment from raising any issue that was or could have been litigated as a defense to plaintiff's reinstatement with the effect of frustrating the purpose of that reinstatement; (2) that the concession as to the ministerial nature of the Comptroller's duly allowed several matters in controversy to be put aside and established that the Comptroller was equally bound by the 1972 judgment along with the trustees, their attor-

neys, and others, under Rule 65(d); and (3) that by turning around and advising the Comptroller that plaintiff was ineligible to serve at SCSC on precisely the same grounds that they had sought to raise as a defense and had abandoned, the Attorney General and the members of his staff involved had acted to nullify or frustrate a judgment by which they were bound.

I. *Position of defendants and respondents at hearing June 27, 1975.*

A hearing was held on plaintiff's motion for interim order re salary payments on June 27, 1975. At the hearing, counsel for defendants and respondents stated that in order to comply with the 1972 judgment, defendant trustees would continue to maintain the status quo as far as continuing plaintiff's faculty appointment with tenure, but that on the basis of the Attorney General's opinion letter, the Comptroller would continue to withhold plaintiff's salary. The District Court urged the Attorney General to seek a declaratory judgment, but the Court was advised that the Attorney General had already taken a position on the matter. (J.A. 121a-125a.)

J. *Dispositions by the District Court.*

On June 23, 1975, the District Court's Memorandum of Decision was filed denying the motion for a contempt judgment and any relief under that, and on June 25, 1975, judgment was filed and entered accordingly. On June 27, 1975, an order was endorsed and entered as to plaintiff's motion for an interim order re salary payments that the motion be denied after hearing held subsequent to clarifi-

cation of judgment and denial of motion for contempt. (J.A. 7a, 93a-95a, 96a, 116a.)

Summary of Argument

The District Court's memorandum set forth the following grounds for its decision:

> "The point of the [1972] judgment that the board offer to reinstate Stolberg was to put him in as good a position as he would have occupied but for the unconstitutional infringement of his first amendment rights. Although the judgment did not explicitly indicate that no decision on the merits of the dual-job ban claim had been made, I indicated to the parties in open court that I did not regard this issue as being in the case.[2] Transcript 173. Now Stolberg seeks to use the judgment not as a shield against interference with his constitutional rights but as a sword predicated on grounds not litigated in the prior proceedings. This he may not do. The judgment is hereby clarified to indicate that it does not prejudice the state's right to assert its constitutional dual-job ban against Stolberg. Any complaints Stolberg may have about the assertion of this ban must be raised in a separate proceeding (most appropriately brought in the state courts). . . ." (J.A. 94a-95a.)

"[2] The plaintiff argues that the issue was in the case because the defendants were specifically authorized to plead the dual-job ban as a defense by the special masters pre-trying the case. (Their report was 'so ordered' by the court.) The defendants did not subsequently raise the defense, however, nor was the dual job ban 'essential to the decision' of the case. Cf. *United States Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 459 (1922). There is, therefore, no compulsion to regard the dual-job ban as an issue litigated in the earlier proceedings." (J.A. 94a-95a.)

The transcript referred to in the above paragraph contained a colloquy among the Court and counsel at the close of the trial in 1971. Four pages of the transcript are reproduced in the Joint Appendix. (J.A. 57a-60a; R. Doc. No. 8, pp. 169-173.) At the close of trial, after defendants had presented no defense and offered to reinstate plaintiff with tenure, there was a discussion about briefing the case. In the light of defendants' offer in open court, the Court indicated that the only remaining question for briefs was that of damages. In the course of that discussion, plaintiff's counsel called the attention of the Court and of defendants' counsel to the fact that no defense had been filed about "the question of office holding while on the faculty," and the Court then commented, "So it's not in the case. . . ." This made it clear that the issue was not to be briefed.

Under familiar principles that equity acts "in the present tense" and in view of the circumstances at the time of the decree and that the parties and those bound with them by a judgment are precluded from raising issues which were or might have been litigated, and as indicated by subsequent correspondence in which the Attorney General acknowledged that defendant trustees were bound by the judgment, it appeared equally clear then and subsequently that plaintiff's tenured status was not subject to attack by defendants, their attorneys, or others bound by the judgment, on grounds of the "dual job ban" provisions.

The District Court's conclusions in this paragraph were based upon several premises each of which contravenes long-recognized precedent and practical considerations in the conduct of litigation. Plaintiff was not attempting to

use the 1972 judgment as a sword but rather as a shield against attacks upon rights established by that judgment which attacks were made by persons bound by the judgment and upon grounds that should have been litigated in connection with that judgment if they were to have been raised by them at all. It is black letter law that the fact that the issue, which clearly could have been raised, was not raised and decided by the District Court does not prevent defendants and others bound by the judgment from being precluded to raise such issues now.

While a court of equity has broad powers to modify or clarify a prior decree, it may not destroy rights established by or under a prior judgment.

The disposition of any defense related to "dual job ban" claims was not only "essential to the decision" in the sense used above, that issue was inseparably related to the monetary damages awarded and to the decision by the District Court and the affirmance in that respect by this Court that exemplary damages were not warranted. See pp. 9-10, above. Thus, not only plaintiff but also the District Court and this Court acted on the grounds that defendants had abandoned their "dual job ban" defense, that plaintiff's reinstatement under the circumstances at the time of the decree and subsequently would leave no grounds for claims for future salary loss, and that the defendants' reinstatement of plaintiff, as offered in open court, and in the circumstances at the time of the decree, undercut any claim for exemplary damages. In these circumstances, the issue should be regarded as having been "essential."

The District Court has wide discretion as to the relief it may choose to grant in contempt proceedings. See, for

example, *Class* v. *Norton,* 376 F. Supp. 496, 500-501 (D. Conn. 1974), *aff'd in part, rev'd in part,* 505 F.2d 123 (2d Cir. 1974). The evidence here is almost entirely documentary and clearly shows actions by persons bound by the 1972 judgment that have the effect of nullifying that order or defeating its purposes. The concessions made by defendants and respondents in the course of proceedings only further establish that. The District Court is "to an extent under an implicit obligation to grant relief to any injured plaintiff." *United States Steel Corp.* v. *United Mineworkers of America,* 393 F. Supp. 942, 946-947 (W.D. Pa. 1975), and the judgment appealed from should be vacated and the case reversed and remanded to the District Court for a finding of contempt, the entry of appropriate equitable orders to protect plaintiff's status as secured by the 1972 judgment until a final determination of the questions that led to this situation can be obtained, and for such further proceedings as are deemed appropriate. *Hopp Press, Inc.* v. *Joseph Freeman & Co.,* 323 F.2d 636 (2d Cir. 1963).

ARGUMENT

I.

The District Court erred in failing to hold that defendant trustees, their attorneys, and others bound by the 1972 judgment were precluded from raising issues, which could have been raised for adjudication before trial and judgment but were not, so as to frustrate or nullify the purpose of the judgment ordering reinstatement.

An endless variety of means is available by which those bound by injunctive relief may act to circumvent or resist its provisions or to frustrate, nullify, or interfere with its purposes. The interest in avoiding repetitious litigation, the long-recognized principles under which equitable proceedings are to afford full and final relief and to administer complete justice, and the basic aim of assuring that the fruits of federal litigation are not rendered futile by attempts, however ingenious, to undermine them, have long supported the use of contempt proceedings as a means of securing relief against such actions and attempts.

Defendants subject to injunctive relief, their attorneys, and others bound with them under Rule 65(d), cannot raise issues after judgment that might have been raised in the litigation leading to the judgment as a means, or with the effect, of thereby frustrating and defeating the purposes of the judgment.

> "It would be to trifle with the court to make a proceeding in equity, designed to give full and final relief, and to administer complete justice, to depend upon the

skill and jugglery by which a defendant might conceal some part of his defense to that suit until it was decided against him, and then set it up as an excuse for disobeying the final decree of the court, or hold it out as the basis of another suit for the title or possession of the same bonds. And whatever difference of opinion may be found in the authorities, on the nice distinctions involved in the question of what is concluded in suits at law, and without even the necessity of going as far as this court has gone in actions at law in holding that all that *might* have been set up as defense in the action must be concluded by the judgment, we are of opinion that in such a case as this, in a suit in equity, when the obvious purpose of the bill is to establish and adjudicate the entire rights and title of the parties before the court to the bonds and their proceeds in all the forms in which they can be identified, the decree must be final and conclusive on all the rights of all the parties actually before the court." *In re Chiles,* 89 U.S. 157, 166, 22 L. Ed. 819, 822 (1875).

"The court order is increasingly resorted to, especially by statute, to coerce performance of duties under sanction of contempt. It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience. Every precaution should be

taken that orders issue, in turnover as in other proceedings, only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place. . . ." *Maggio* v. *Zeitz,* 333 U.S. 56, 68-69, 92 L. Ed. 476, 487, 68 S. Ct. 401 (1948). (Footnote and citations omitted.)

". . . However, where, instead of a temporary injunction, a permanent injunction is violated, the interest in enforcement consists not only of the need to maintain respect for court orders and for judicial procedures, but also of the need to avoid repetitious litigation. This latter interest, the interest which the doctrine of *res judicata* serves in all of its applications, militates in favor of barring collateral attacks upon permanent injunctions in civil contempt proceedings as well as in criminal cnes. Here Local 282 could have sought review of the breadth of the injunction we issued by a petition for a rehearing, by a petition for a writ of certiorari, or conceivably by a petition for a writ of prohibition. These remedies do not appear to have been attempted and, of course, the litigation of issues which have been or could be litigated in a given case should reach repose when final judgment in that case is entered." *NLRB* v. *Teamsters Local 282,* 428 F.2d 994, 999 (2d Cir. 1970).

"Upon proceedings to punish for contempt, the propriety of the restraining order or injunction is not open. The respondent, if a party, may only deny knowledge of the order or decree and that his act was within

> it. Where the respondent is a third person, he may in addition to the denials open to a party deny that he acted in such relation to the party enjoined so as to be bound by the injunction." *7 Moore's Federal Practice,* ¶65.13, p. 65-117 (2d ed. 1974). (Footnotes and citations omitted.)

See, also, *Dugas* v. *American Surety Co.,* 300 U.S. 414, 425, 81 L. Ed. 720, 726, 57 S. Ct. 515 (1937); *Howat* v. *Kansas,* 258 U.S. 181, 189-90, 66 L. Ed. 550, 559, 42 S. Ct. 277 (1922); *AMF Inc.* v. *International Fiberglass Co.,* 469 F.2d 1063, 1065 (1st Cir. 1972); *Hopp Press, Inc.* v. *Joseph Freeman & Co.,* 323 F.2d 636, 637 (2d Cir. 1963); *Kasper* v. *Brittain,* 245 F.2d 92, 96-97 (6th Cir. 1957); *Alemite Mfg. Corp.* v. *Staff,* 42 F.2d 832, 833 (2d Cir. 1930); *Brougham* v. *Oceanic Steam Navigation Co.,* 205 Fed. 857, 860 (2d Cir. 1913).

Defendants and those bound with them by injunctive relief should not be permitted to insist upon overly narrow or technical interpretations of the injunctive terms so as to violate the spirit of the injunction and defeat its purpose while complying with the strict letter of the injunction. ". . . Such a rule would give tremendous impetus to the program of experimentation with disobedience of the law . . . condemned in *Maggio* v. *Zeitz," supra. McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187, 192, 93 L. Ed. 599, 605, 69 S. Ct. 497 (1949).

> ". . . In deciding whether an injunction has been violated it is proper to observe the objects for which the relief was granted and to find a breach of the decree and a violation of the spirit of the injunction, even though its strict letter may not have been disregarded.

> . . . From what has already been said, it is plain that by displaying the Stetson name so conspicuously the defendants violated the spirit of the injunction and defeated its purpose, whether or not its strict letter was violated, . . . " *John B. Stetson Co.* v. *Stephen L. Stetson Co.,* 128 F.2d 981, 983 (2d Cir. 1942), cert. denied, 299 U.S. 605, 81 L. Ed. 446, 57 S. Ct. 232. (Citations omitted.)

The Attorney General and his staff are bound both by the express terms of Rule 65(d), F.R. Civ. P., and by case law, not to act or advise so as to cause nullification or resistance of an order. *Sawyer* v. *Dollar,* 190 F.2d 623, 634 (D.C. Cir. 1951), judgment vacated and cause dismissed as moot, 344 U.S. 806-807, 97 L. Ed. 628, 73 S. Ct. 7 (1952); *In re Soules,* 41 Fed. 752 (D. Vt. 1890).

Rule 65(d) is not couched in terms relating to governmental officers. However, the interpretations of Rule 65(d) in *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168, 179-80, 38 L. Ed. 2d 388, 400, 94 S. Ct. 414 (1973), and in *Regal Knitwear Co.* v. *NLRB,* 324 U.S. 9, 13-15, 89 L. Ed. 661, 666-67, 65 S. Ct. 478 (1945), show that an injunctive order binds not only parties but also those in privity with them, represented by them, or subject to their control; the order cannot be nullified by carrying out prohibited acts through aiders and abettors.

In terms of governmental officers:

> ". . . There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that

party and another officer of the government." *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 402-403, 84 L. Ed. 1263, 1276, 60 S. Ct. 907 (1940). (Citations omitted.)

As to the Comptroller and the members of his staff who are respondents here, it is clear that they are the persons whose direct acts in refusing to deliver payroll checks bring about these proceedings. The concession by defendants and respondents that the Comptroller's duty to make salary payments is a ministerial duty plainly puts the Comptroller within the ambit of Rule 65(d). While they may claim that they relied on advice of counsel, that does not excuse an act of contempt. *United States* v. *International Business Machines Corp.,* 60 F.R.D. 658, 666 (S.D.N.Y. 1973), appeal dismissed, 493 F.2d 112 (2d Cir. 1973), appeal dismissed and cert. denied sub nom. *Cravath, Swaine, and Moore* v. *United States,* 416 U.S. 976, 40 L. Ed. 2d 756, 94 S. Ct. 2378. Not only are the members of the Comptroller's Office subject to appropriate sanctions here, their conduct is all the more inexcusable in the light of the complete irregularity of their actions and the failure of any of such actions to find support in the State's constitution, statutes, regulations, or other practices, governing the procedures of the Office of the Comptroller.

One matter under Connecticut law that is clear is that under Section 3-119, Conn. Gen. Stats., the Comptroller is to pay salaries between ten and fifteen days after the close of a payroll period upon a signed statement that the employee was "duly appointed" to an authorized position and has rendered the services in question. He has no authority to dismiss personnel or terminate their sal-

aries on other grounds. Those functions, after due appointment of classified employees, are carried out under the Commissioner of Personnel and Administration, Chapter 67, Conn. Gen. Stats., and, for faculty members at State Colleges, by the trustees. (R. Doc. No. 29, ¶¶2, 3, and annexed documents.)

Here, a single attorney represents all defendants and respondents. (J.A. 89a.) In these circumstances, that is, in connection with an attorney's actions on behalf of a client in judicial proceedings, the attorney's actions and representations are also those of the client. *NLRB* v. *Lewis,* 249 F.2d 832 (9th Cir. 1957), *aff'd,* 357 U.S. 10, 2 L. Ed. 2d 1103, 78 S. Ct. 1029 (1958). There is, of course, a presumption that the attorney appearing in court is authorized to carry out the representation. *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 829-31, 6 L. Ed. 204, 226 (1824); *Danisch* v. *Guardian Life Ins. Co.,* 151 F. Supp. 17, 19 (S.D.N.Y. 1957); *Kaufman* v. *Wolfson,* 137 F. Supp. 479, 481 (S.D.N.Y. 1956); 7 Am. Jur. 2d, *Attorneys at Law,* §§112-116 (1963). We may further infer that the Attorney General's common representation of defendants and respondents in this proceeding constitutes a ratification by the trustees of the acts of the Attorney General in this matter. *In re Lacivita,* 255 F.2d 365, 366 (3rd Cir. 1958); 7 Am. Jur. 2d, *Attorneys at Law,* §106 (1963); and the representation by the Attorney General of the defendants and respondents imputes to them the knowledge of the Attorney General. 7 Am. Jur. 2d, *Attorneys at Law,* §§107-110 (1963).

"The absence of wilfulness does not relieve from civil contempt." *McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187, 191, 93 L. Ed. 599, 604, 69 S. Ct. 497 (1948). The

coordinate positions of defendants and respondents, based on a claim that should have been litigated and adjudicated if it were to have been raised at all by defendants, their attorneys, or others bound by the judgment, plainly gives rise to the nullification of the relief afforded Stolberg by the judgment. Such continued coordinate action, by persons so related to defendants and on such grounds, which interferes with and defeats the purpose of the judgment constitutes contempt authorizing and requiring "full remedial relief." *McComb* v. *Jacksonville Paper Co., supra,* at page 193, 93 L. Ed. at 605, 69 S. Ct. at 500; *United States Steel Corp.* v. *United Mine Workers of America,* 393 F. Supp. 942, 947-49 (W.D. Pa. 1975).

It has been clear since *Dowe* v. *Egan,* 133 Conn. 112, 48 A.2d 735 (1946), that the Office of the Attorney General could have represented separate positions within the State's government by separate members of the staff of that Office. A recent unreported decision, in *Quist* v. *Connecticut Commission on Human Rights and Opportunities,* Docket No. 5055, Court of Common Pleas, Tolland County, November 10, 1975. See, 44 U.S.L. Week 2249 (December 9, 1975).

For the above reasons, the District Court should not have denied relief to Stolberg in these proceedings. The errors in the grounds on which the District Court did so are as follows:

A. *The District Court erred in interpreting the 1972 judgment as not being effective in the circumstances existing when it was issued.*

As injunctive relief ". . . necessarily must operate *in futuro,* in an action for such relief equity speaks as of the date of its decree." *Tilbrook* v. *Forrestal,* 65 F. Supp. 1, 4 (D.D.C. 1946). (Footnote omitted.) It is a familiar principle of equity:

> ". . . that when it takes jurisdiction of a cause and decides that relief shall be granted, the relief, including damages, if any, will be tailored to suit the situation as it exists on the date the relief is granted." *Tenney* v. *Jacobs,* 43 Del. Ch. 526, 530, 240 A.2d 138, 140 (1968).

Equity cannot disregard changed circumstances since the filing of the suit and must afford relief appropriate to events occurring pending the suit and conditions at the time of the decree. *United States* v. *Von's Grocery Co.,* 233 F. Supp. 976, 984 (S.D. Cal. 1964), *rev'd on other grounds,* 348 U.S. 270, 16 L. Ed. 2d 555, 86 S. Ct. 1478 (1966); *Champion Spark Plug Co.* v. *Reich,* 121 F.2d 769, 772 (8th Cir. 1941), *cert. denied,* 314 U.S. 669, 86 L. Ed. 535, 62 S. Ct. 130. The purpose of this familiar rule in equity is to ". . . make an end of the litigation . . ." and to allow the parties to proceed in reliance upon the decree and free of possible claims of impediments that were or could have been litigated. *Kilbourne* v. *Board of Supervisors of Sullivan County,* 137 N.Y. 170, 178-79, 33 N.E. 159, 162 (1893).

B. *The District Court erred in failing to hold that defendants and those in privity with them were barred from raising pre-judgment issues.*

It has long been recognized that a final judgment on the merits binds the parties and their privies not only as to every matter offered to sustain or defeat the claim but as to any matter which might have been offered. *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371, 378, 84 L. Ed. 329, 334-35, 60 S. Ct. 317 (1940); *Cromwell* v. *County of Sac,* 94 U.S. 351, 352, 24 L. Ed. 195, 197 (1877); *Brown* v. *Bridgeport Rolling Mills Co.,* 245 F. Supp. 41, 44 (D. Conn. 1965); *Corey* v. *Avco-Lycoming Division, Avco Corp.,* 163 Conn. 309, 317, 307 A.2d 155, 160 (1972), *cert. denied,* 409 U.S. 1116, 34 L. Ed. 2d 699, 93 S. Ct. 903; *Scott* v. *Scott,* 83 Conn. 634, 638, 78 Atl. 314, 316 (1910).

"The efficient and fair administration of justice requires that litigation of an issue at some point come to an end." *Class* v. *Norton,* 505 F.2d 123, 125 (2d Cir. 1974). In support of that interest and the interest in not allowing relief under a judgment to be undermined by actions of persons bound by the judgment through the raising of issues that could have been litigated, the District Court should have enjoined such actions and erred in not doing so.

C. *The District Court erred in holding that the "dual job ban" issue was not "essential" to the earlier decision.*

The District Court cited *United Shoe Machinery Corp.* v. *United States,* 258 U.S. 451, 459, 66 L. Ed. 708, 718, 42 S. Ct. 363 (1922), to support the conclusion that the "dual job ban" issue was not essential to the decision in 1972. The Supreme Court, in *United Shoe,* held that the United

States was not bound on a particular issue in a second suit by the results of earlier litigation between the parties because, inasmuch as the issue rested on statutes adopted after the earlier litigation and before the second suit, the issue was not and could not have been involved or decided in the former suit and did not therefore involve a "question essential to the decision." 258 U.S. at 462, 66 L. Ed. at 719.

In this case, we have not only the same action and an issue which could have been involved and decided, we have the facts that legal and equitable relief were awarded in conjunction and that the District Court and this Court weighed defendants' offer of reinstatement with tenure, in open court, as a heavy consideration militating against an award of exemplary damages. 474 F.2d at 489. See pages 9-16, above. The offer in open court, which Stolberg had every reason to consider not to be subject to hidden infirmities, also eliminated the necessity or possibility of claiming damages for future salary loss.

It should be noted that the "dual job ban" provision of Art. 3, §11, Constitution of 1965, and Section 2-5, Conn. Gen. Stats., erect a bar "during the term for which" the member of the General Assembly is elected. It was on that phrase that the Attorney General's opinion of Stolberg's ineligibility rested. (J.A. 72a.) Had the Attorney General maintained a consistent position and not waived such claims, he would have had to have asserted that Stolberg could not have returned until the January of an odd year, that is, in the middle of an academic year, after the end of a General Assembly term without reelection. See, Art. 3, §§8, 10, Conn. Const. There was no hint that this position was or would be taken.

For these reasons, it was essential to the decision of the case and to the relief granted that any such claims

as are now asserted by persons bound by the judgment were effectively abandoned and must be considered to have been determined against defendants, and the District Court erred in not so holding.

D. *The District Court erred in interpreting or clarifying the 1972 judgment to permit the actions of defendants and respondents.*

In its decision, the District Court "disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212, 97 L. Ed. 245, 252, 73 S. Ct. 245 (1952). Defendants and others bound by the 1972 judgment should be precluded by that judgment from undermining Stolberg's tenured status on grounds of the "dual job ban" issue which was abandoned by them. The interpretation or clarification by the District Court has changed this. Stolberg, having been reinstated with tenure and having returned, now finds himself with tenure but without a salary.

The significance of this change is that it allows defendants and respondents to terminate Stolberg's salary with no prior determination in a due process hearing as to the validity of the grounds on which such termination rests, violating rights under the Civil Rights Acts. *Perry* v. *Sindermann*, 408 U.S. 593, 599-603, 33 L. Ed. 2d 570, 578-81, 92 S. Ct. 2694 (1972).

II.

The District Court erred in not reaching the merits of plaintiff's claims.

Here, after obtaining leave to plead a defense based on Art. 3, §11, of the Connecticut Constitution of 1965, and on §2-5, Conn. Gen. Stats., defendants did not plead that defense and offered reinstatement with tenure in open court. In subsequent communications, the same Assistant Attorney General who represented defendant trustees, on behalf of the same Attorney General, acknowledged that defendant trustees would comply with the letter and the spirit of the 1972 order and advised defendant trustees to reinstate plaintiff, and they did. (J.A. 105a-106a, 118a-120a.) Once plaintiff had been reinstated, the same persons then advised the Comptroller that Stolberg could not hold his faculty position " . . . during the term for which he is elected. . . . " (J.A. 72a.) This was not explained as having been based on an interpretation of applicable law but as a conclusion reached when defendants' counsel "finally worked out exactly what [he] wanted." (J.A. 118a.) See page 16, above. Even if this sequence were not willful or calculated, contempt would lie.

There is certainly a basis for finding a deliberate design to nullify the 1972 judgment sufficient to support individual liability and, in any event, for finding actions which had the effect of nullifying the 1972 judgment sufficient to support relief directed against defendants and respondents in their official capacities. It was error for the District Court not to have reached and to have denied these claims.

III.

The District Court erred in denying any relief at all.

The District Court has broad discretionary power to fashion equitable remedies in proceedings of this type to accomplish what is necessary, fair, and workable. *Lemon* v. *Kurtzman,* 411 U.S. 192, 200, 36 L. Ed. 2d 151, 161, 93 S. Ct. 1463 (1973); *Class* v. *Norton,* 376 F. Supp. 496, 500-501 (D. Conn. 1974).

The District Court could treat plaintiff's Verified Application and Petition as a petition in the nature of a supplemental bill seeking to enlarge or amend the terms of the judgment so as to preserve the integrity of the judgment's purpose against acts or omissions such as those now before this Court. *Lamb* v. *Cramer,* 285 U.S. 217, 219, 76 L. Ed. 715, 718, 52 S. Ct. 315 (1932); *Lamb* v. *Schmidt,* 285 U.S. 222, 76 L. Ed. 720, 52 S. Ct. 317 (1932); *Walling* v. *Jacksonville Paper Co.,* 69 F. Supp. 599, 608 (S.D. Fla. 1947), aff'd sub nom. *Jacksonville Paper Co.* v. *McComb,* 167 F.2d 448 (5th Cir. 1948), rev'd, 336 U.S. 187, 93 L. Ed. 599, 69 S. Ct. 497 (1949).

In the circumstances of this case, however, there is an "implicit obligation" to grant relief at least to the extent of protecting the fruits Stolberg obtained under the 1972 judgment and avoiding the possibility of a windfall to some of the parties with a concomitant loss to others. *United States Steel Corp.* v. *United Mine Workers of America,* 393 F. Supp. 942, 946-47 (W.D. Pa. 1975).

In such circumstances, it is error to deny any and all relief.

IV.

The District Court erred in interpreting or clarifying the judgment so as to permit defendants and respondents to act to undermine rights and obligations established thereunder.

See Part I(D) of the Argument, at page 42, above.

V.

The District Court erred in not reaching the merits of plaintiff's claims that certain respondents acted in bad faith.

We have set forth above the detailed and documented evidence that the respondents Attorney General and Assistant Attorney General first sought and had permission to plead the "dual job ban" defense, then failed to plead it, then offered reinstatement with tenure in open court, then advised defendant trustees to reinstate Stolberg with tenure and advised Stolberg that defendant trustees would do so, all in spite of the fact that Stolberg was at all times serving as a member of the General Assembly, and, then, shortly after Stolberg had been reinstated with tenure, advised the Comptroller that Stolberg had been ineligible to serve on the SCSC faculty since 1971. We have also set out testimony that this opinion was reached not on the basis of a good faith interpretation of applicable law but as a result of working out what was desired.

In addition, the Office of the Attorney General has undertaken to represent all defendants and respondents, thus ensuring that whatever their separate views might be, the effective termination of Stolberg's salary is continued.

In addition, all of such actions are based on advice which depends upon the conclusions that: the State Colleges fall within one of the State's three governmental departments: executive, judicial, or legislative; *and* when Stolberg returned to SCSC in 1974 he somehow gave up his position there rather than in the General Assembly.

The first of these conclusions ignores the long history of the State Colleges and their ancestor schools as independent state institutions. They were established in 1849 with a Board of Trustees to be appointed by the legislature. Chapter 23, Public Acts of 1849. In 1914, following the enactment of the Connecticut Civil Service Act, the Attorney General was asked whether that Act applied to the faculty of the normal schools, the predecessors of the State Colleges, and he replied that they were not state officials or employees "because they are not employed by one of the political departments of the state." (1913-14 Op. Atty. Gen. 165-69.)

By legislation and constitutional amendment in 1965, the State Colleges were placed in the State's System of Higher Education, under Article Eighth of the Constitution, §2, separate from the articles of the Constitution providing for the legislative, executive, and judicial, departments of the State's government. The University of Connecticut is also a part of that System, and the independence and autonomy intended to be granted to such institutions is indicated in *Simmons* v. *Budds*, 165 Conn. 507, 514, 338 A.2d 479, 483 (1973), in which the Supreme Court of Connecticut, referring to the proceedings of the 1965 Convention, stated, ". . . It was intended that the board of trustees and the administrators were to be free to decide what is wise in educational policy."

The overwhelming evidence, history, and arguments, in support of the existence of such independent state institutions and the status of the State Colleges among those independent institutions was set out before the District Court. (R. Doc. No. 12, pp. 88-179.) In these circumstances the Attorney General's continued refusal to seek a declaratory judgment should be considered to establish bad faith. Rather than seeking the resolution of controverted issues of state law, part of his official duties, the Attorney General has since 1971 raised such issues only as a threat or instrument of harassment to plaintiff while simultaneously avoiding steps toward eliminating doubt about the issues. A declaratory judgment action brought by or on behalf of the state would be privileged in respect to assignment for trial. Section 213, *Connecticut Practice Book.*

Whether described as "bad faith," "malice," or "a clear abuse of discretion," such a course of action requires consideration of the claims against respondents as individuals, and the District Court erred in denying or not considering such claims. *Class* v. *Norton,* 505 F.2d 123, 127-28 (2d Cir. 1974).

VI.

The District Court erred in denying Stolberg's motion for immediate and interim salary relief.

In the *Morgan* litigation: *Morgan* v. *United States,* 298 U.S. 468, 80 L. Ed. 1288, 56 S. Ct. 906 (1936); *Morgan* v. *United States,* 304 U.S. 1, 82 L. Ed. 1129, 58 S. Ct. 773 (1938); *United States* v. *Morgan,* 307 U.S. 183, 83 L. Ed. 1211, 59 S. Ct. 795 (1939); *United States* v. *Morgan,* 313 U.S. 409, 85 L. Ed. 1429, 61 S. Ct. 999 (1941); it was established that the District Court has equitable powers to provide, during the course of lengthy litigation, that interim relationships among the parties shall be established and preserved so that a continuing relationship may be maintained while underlying questions of law affecting the relationship are determined and so that none of the parties will reap a windfall or suffer an inequitable loss.

In these proceedings, as soon as defendants and respondents conceded the ministerial nature of the duty of the Comptroller to make salary payments, Stolberg moved for an interim order which would have allowed and supported the maintenance of the *status quo* while, if necessary, state litigation or other steps were undertaken to determine the underlying rights and responsibilities of plaintiff, defendants, and respondents. In these circumstances, Stolberg clearly met the requirements for preliminary or interim equitable relief of sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247, 250

(2d Cir. 1973). This would have allowed Stolberg to maintain the fruits of the earlier litigation in this action while an equitable resolution was achieved of questions subsequently raised by respondents. The denial of the relief sought by motion, coupled with the denial of any other relief in these proceedings, constituted error.

CONCLUSION

Plaintiff-appellant respectfully requests this Court, for all of the foregoing reasons, to vacate the judgment below entered June 25, 1975, and the order entered June 27, 1975, on plaintiff's motion for interim order re salary payments, and to reverse and remand the cause with a direction for a finding of contempt, for the entry of appropriate equitable orders to protect plaintiff's status as secured by the 1972 judgment until a final determination of the matters at issue between and among the parties, and for such further proceedings in the District Court and such further relief as are deemed appropriate.

Respectfully submitted,

Louis M. Winer
Tyler, Cooper, Grant,
Bowerman & Keefe
205 Church Street
P. O. Box 1936
New Haven, Connecticut 06509
Attorneys for Plaintiff-Appellant
Irving Stolberg

Appendix

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the State of Connecticut, 1965

ARTICLE THIRD
OF THE LEGISLATIVE DEPARTMENT

* * * * *

§ 11. Dual office holding

Sec. 11. No member of the general assembly shall, during the term for which he is elected, hold or accept any appointive position or office in the judicial or executive department of the state government, or in the courts of the political subdivisions of the state, or in the government of of any county. . . .

* * * * *

ARTICLE EIGHTH
OF EDUCATION

* * * * *

§ 2. System of higher education

Sec. 2. The state shall maintain a system of higher education, including The University of Connecticut, which shall be dedicated to excellence in higher education. The general assembly shall determine the size, number, terms and method of appointment of the governing boards of The University of Connecticut and of such constituent units or coordinating bodies in the system as from time to time may be established.

* * * * *

Connecticut General Statutes

* * * * *

§ 2-5. Holding of office by members of the general assembly

No member of the general assembly shall, during the term for which he is elected, be nominated, appointed or elected by the governor, the general assembly or any other appointing authority of this state to any position in the judicial, legislative or executive department of the state government, except as provided in this section. The provisions of this section shall not apply where it is expressly provided by law that a member of the general assembly as such shall be nominated or appointed to any board, commission, council or other agency in the legislative department.

* * * * *

§ 3-119. Payment of salaries; statement of officers. Electronic system for personnel data

The comptroller shall pay all salaries and wages not less than ten days nor more than fifteen days after the close of the payroll period in which the services were rendered, but shall draw no order in payment for any service of which the payroll officer of the state has official knowledge without the signed statement of the latter that all employees listed on the payroll of each agency have been duly appointed to authorized positions and have rendered the services for which payment is to be made. . . .

* * * * *

§ 10-109b. Duties of state college trustees

Said board of trustees shall administer the state colleges, plan for the expansion and development of the institutions

within its jurisdiction, and submit such plans to the commission for higher education for approval. The commissioner of public works shall, in accordance with section 1 of this act, negotiate and execute leases on such physical facilities as the board may deem necessary for proper operation of such institutions, subject to the approval of the commission, and said board may expend capital funds therefor if such leasing is required during the planning and construction phases of institutions within its jurisdiction for which such capital funds were authorized. The board may appoint or remove the chief executive officer of each institution within its jurisdiction, and with respect to its own operation the board of trustees may appoint and remove an executive secretary and executive staff. The board may determine the size of the executive staff and the duties, terms and conditions of employment of said secretary and staff, subject to the approval of the commission. The board of trustees may employ faculty and other personnel needed to maintain and operate the institutions within its jurisdiction. Within the limitation of appropriations, the board shall fix the compensation of such personnel, establish terms and conditions of employment and prescribe their duties and qualifications. Said board shall determine who constitutes its professional staff and establish compensation and classification schedules for its professional staff. . . .

* * * * *

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 22 day of Dec 19 75, at 3:30 o'clock P.M. he served the annexed Brief of Plaintiff-Appellant No. 75-7426 in Re: Irving Stolberg v. Members of the Board of the Trustees for the State College of the State of Connecticut upon

Carl R. Ajello, Attorney General
Esq(s)., Attorney(s)

for Defendants-Appellees and Respondents-Appellees

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

30 Trinity Street
Hartford, Conn. 06115

that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 22
day of December 1975

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1976